



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Engineered Fabrics Corporation

File: B-239837; B-239839

Date: October 3, 1990

Carl P. Simmons for the protester.
Millard F. Pippin, United States Air Force, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest is sustained where agency refused to consider qualifying the protester as an approved source for aircraft fuel cells on the basis of the firm having supplied cells for similar aircraft in the past in lieu of passing a 300-hour flight test, because the record indicates that qualification by similarity may have been used in other cases and agency has offered no rational explanation for its decision to forego such a procedure here.

DECISION

Engineered Fabrics Corporation (EFC) protests the Department of the Air Force's decision to establish a 300-hour flight testing requirement for fuel cells to be used in T-37 training aircraft. The protester contends that this improperly restricts competition.

We sustain the protest.

Request for proposals (RFP) No. F41608-90-R-0045 (0045) was issued on January 2, 1990, for T-37 fuel cells in support of various programs including the Service Life Extension Program (SLEP) which involves the rehabilitation of the T-37 trainers. RFP No. F41608-90-R-41794 (41794) was issued on January 30; all of its 145 cells were intended to support the SLEP program. Each solicitation provided for first article testing by the government during a 120-day period for "form, fit and function." Waiver of such testing could be obtained only if an offeror was currently providing the T-37 cells or it had been a previous supplier.

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EFC is not a previously approved source for T-37 fuel cells; however, it has produced fuel cells for tactical and training aircraft and has allegedly been qualified for the production of some of these cells on the basis of their similarity to other cells it has produced. By letter dated January 24, the protester sought to obtain additional engineering information in order to discover precisely what the Air Force required in this regard so that it could compete for the T-37 requirements.

During the next 2 months, EFC's inquiry precipitated a review of the two open solicitations for T-37 fuel cells. Prior to that time, agency engineers and contracting officials appear to have anticipated only limited competition from the two existing approved sources; the cognizant engineering activity had not established any specific criteria for new source approvals. The Air Force engineers determined on March 22, however, that previously unapproved sources, such as EFC, would have to qualify their T-37 cells by having them flight tested for 300 hours because they were critical to flight safety. As a result of the technical and procurement review, solicitation No. 0045 (which had been placed in an indefinite status before closing) was canceled on May 7, and solicitation No. 41794 (under which EFC had submitted an offer on March 14) was canceled on May 24.

On May 30, Justifications and Approvals (J&As)^{1/} were issued pursuant to 10 U.S.C. § 2304(f) (1988) to permit the procurement of T-37 cells urgently needed for the SLEP program from one of two previously "approved" sources: Uniroyal or American Fuel Cells and Coated Fabrics Co. (Amfuel). The J&As cited "unusual and compelling urgency" pursuant to 10 U.S.C. § 2304(c)(2) as the basis for using other than competitive procedures. According to the agency, the reason for the urgency was a need to have cells delivered by March or April 1991 to avoid a critical impact on the availability of T-37 trainers. As the agency explains, the 300-hour flying requirement cannot be met by EFC or any other nonapproved source during this time frame since flight testing takes a total of approximately 9 months to complete given the T-37's flying schedule. On September 20, the Air Force further informed this Office that on the basis of the J&As it conducted a restricted-source procurement under solicitation No. F41608-90-R-0101

^{1/} Since different part numbers attach to various configurations of the T-37 fuel cells, i.e., left or right cells, etc., a different J&A was issued supporting each part number.

(0101) for the SLEP requirements which resulted in the award of a contract to Amfuel on June 26. The Air Force further advised that it has solicited for the balance of the T-37 fuel cell requirements on an "unrestricted" source-approved basis under RFP No. F41608-90-R-42081 (42081), and that the protester has submitted an offer which is under evaluation.

In its protest, EFC initially argues that the Air Force contrived the need for a 300-hour flying requirement only after learning that the protester had submitted the low offer under solicitation No. 41794 in an improper attempt to eliminate the firm from competition. EFC also questions the technical necessity for such a flying test and submits that, for tactical and training aircraft, the agency has previously qualified cells by comparing its needs to cells which EFC and others had produced for other aircraft. The protester asserts that it was unreasonable for the Air Force to automatically eliminate it as a potential source by categorically refusing to consider qualifying it by similarity, especially in light of a previous procurement history indicating that Amfuel may have been so qualified in the past, and in light of the fact that the agency is now waiving the flight testing requirement for Amfuel on the sole basis that the firm produced T-37 cells for a private concern some 26 years ago.

We find no support for EFC's initial allegation that the Air Force technical staff and contracting officials contrived the 300-hour requirement after March 14 in a deliberate attempt to deny the protester an opportunity to compete once they discovered EFC had submitted the low offer under solicitation No. 41794. Although the 300-hour requirement was not finalized by the engineers until March 22, it appears that as early as March 12--several days before the amended closing date for receipt of proposals--the engineers were discussing the need for a procedure to have new sources approved. Further, the Air Force states that its engineers were unaware of EFC's March 14 offer and nothing in the record suggests a contrary conclusion. Thus, we have no basis to conclude that the agency acted improperly after the submission of the protester's offer, as alleged, to deny EFC an opportunity to compete by virtue of a revised testing requirement. See Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579 (bad faith will not be presumed on the basis of inference or supposition).

Nonetheless, we sustain the protest. The Competition in Contracting Act of 1984 requires that solicitations must specify an agency's needs and solicit offers in a manner designed to achieve full and open competition, 10 U.S.C. § 2305(a)(1)(A)(i) (1988), and include restrictive

provisions only to the extent necessary. 10 U.S.C. § 2305(a)(1)(B)(ii). Thus, an agency must have a reasonable basis for including provisions which restrict the ability of offerors to compete for the agency's requirement. See John F. Kenefick Photogrammetric Consultant, Inc., B-238384, May 4, 1990, 90-1 CPD ¶ 452. Since testing requirements used in determining the acceptability of a product are by nature restrictive, they must be directly related to the agency's minimum needs and applied in a reasonable manner. We will object if the record does not disclose that the agency had a reasonable basis for imposing particular testing requirements. See Wild & Leitz Technologies Corp., B-224302, Nov. 12, 1986, 86-2 CPD ¶ 552.

For the reasons set forth below, we find that the Air Force, despite being accorded two opportunities to supplement its initial agency report in this matter, has failed to reasonably explain why the 300-hour flight testing requirement is necessary for all firms which have not produced T-37 fuel cells before and why it has taken the position that the requirement can never be satisfied by a potential offeror such as EFC as a result of its having produced similar cells for other aircraft. Cf. Charles J. Dispenza & Assocs., B-183131, Apr. 6, 1975, 75-1 CPD ¶ 229.

EFC has argued that other firms have been qualified by the Air Force to supply fuel cells for sophisticated aircraft, such as the F-15 and the KC-135, by similarity to other cells they have manufactured and that it has likewise received such approval to supply fuel cells for a new Air Force trainer--the Beechjet 400 T--on the basis of similarity to cells it provided for the Piper PA-42. The protester argues that the engineers are acting unreasonably when they categorically preclude the firm from qualifying as an approved source for fuel cells for the less sophisticated T-37 trainers. EFC also points out that while flight testing may be of benefit in evaluating fuel system parts which are subject to motion during flight, it is at best unclear what benefits it will provide with regard to static parts such as fuel cells.

The contracting officer explains that, although the T-37 engineers are not responsible for the F-15, KC-135, and Beechjet 400 T aircraft, and are unfamiliar with the circumstances which may have prompted approval of their fuel cells by similarity, they "feel that a 300-hour flight test is necessary based on the facts and circumstances peculiar to the T-37 system." [Emphasis supplied.] The engineers themselves state that they do not know why approval by similarity may have been granted in the case of the other aircraft and note that, without more, EFC's documentation

appears somewhat incomplete with regard to the approval process for the F-15 and the Beechjet 400 T ^{2/}; they also state that to the extent that such approval was actually granted by other agency engineers in these cases, that was, in their unexplained view, "in error."

While never explaining what "facts and circumstances peculiar to the T-37 system" actually would preclude qualification by similarity, the engineers do state that tactical aircraft such as the F-15 are more complex than T-37s and that fuel cells are more critical in trainers like the T-37 which are piloted by inexperienced crews. The engineers' position with regard to the T-37 fuel system seems to be, in essence, that any parts which are "critical to the safety of [the] flight of an aircraft" must be flight tested and that T-37 fuel cells are considered "critical" to flight safety because, whether they move or not in flight, their failure "can result in catastrophic aircraft loss."

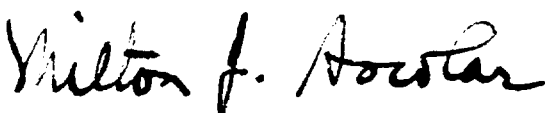
The Air Force engineers' conclusory statements do not establish a reasonable basis for the determination that mandatory flight testing of T-37 fuel cells is necessary. We are left to speculate regarding the agency's needs and how the restriction would meet them. For example, as noted above, the Air Force states that T-37 aircraft pilots have little experience in the aircraft and with its associated emergency procedures, so that the Air Force must be sure it does not "expose these pilots to avoidable safety hazards." The agency does not go beyond this bare statement to suggest the nature of potential fuel cell failures--e.g., whether they are primarily in-flight problems where the experience of a veteran crew could possibly serve to compensate for a malfunction or impact-related problems where the relative experience of the crew would presumably not be a factor in precluding a catastrophe. The Air Force has not explained whether or not the two-person crew of the T-37 trainer includes an experienced instructor in addition to a trainee. The record contains no information about the T-37's physical configuration or flying mission which would serve to make the trainer more likely than a 400 T, F-15 or KC-135 to encounter particularly dangerous fuel cell failures in flight. Without such information we have no basis upon which to evaluate the engineers' general conclusions. Without more, the engineers' statements do not justify a

^{2/} The Air Force takes no exception to the protester's assertions that approval was granted by similarity for fuel cells for the KC-135.

refusal to consider whether cells previously produced by EFC could be used as a basis for qualification of that firm.

The agency's decision to impose the 300-hour flight testing requirement, thereby limiting competition, does not have a rational basis, as required by law. With performance underway on the contract awarded on an urgent basis to Amfuel under solicitation No. 0101, we do not believe that it is practical to recommend termination because of the overly restrictive testing requirement. We recommend that the Air Force, before evaluating offers under solicitation No. 42081 or issuing any future solicitations for T-37 fuel cells, fully document justification for any flight testing requirement for T-37 cells and, in the course of such analysis and documentation, determine whether EFC can reasonably be considered an approved source on the basis of qualification by similarity.

We find that the protester is entitled to recover the reasonable costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1990).

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